No. 96-972

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1996

RONALD C. MANDRGOC,

Petitioner,

v.

PATAPSCO &
BACK RIVERS RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit appropriately affirm the lower court's decision to exercise sound discretion in excluding evidence of prior unrelated derailments?

2. Did the United States Court of Appeals for the Fourth Circuit appropriately affirm the lower court's judgment in favor of the railroad in a Federal Employers' Liability Act ("FELA") case where the plaintiff proffered only the evidence of a partial derailment itself in an attempt to invoke the res ipsa loquitur doctrine?

LIST OF PARENT COMPANIES
AND NONWHOLLY OWNED SUBSIDIARIES

Respondent is a publicly held corporation which is a wholly owned subsidiary of Bethlehem Steel Corporation. The Respondent is not affiliated with any other corporate entity.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case omits critical facts relied upon by the opinions of the courts below. The undisputed facts as set forth here will assist this Court in understanding how the lower courts decided this case. The following undisputed facts of record clearly demonstrate that the courts below correctly applied this Court's precedent with respect to the doctrine of res ipsa loquitur as well as the Federal Rules of Evidence.

Ronald C. Mandrgoc, Petitioner herein, was working for the Patapsco & Back Rivers Railroad Company (hereinafter "Railroad") at the time of the occurrence complained of. The Railroad is an industrial short line railroad which primarily services the steel making operations of the Bethlehem Steel plant in Sparrows Point, Maryland. Such work includes moving railroad cars of raw materials into the mills and taking finished products out to the next stage of the

process. The work is accordingly repetitive and frequently involves the same moves required to keep the plant running. The plant operates twenty-four hours a day, with three shifts.

The crews operating the cars consist of an engineer and at least one "groundman" (i.e. brakeman or conductor). The engineer sits in the locomotive and operates it, but only in response to signals from the groundmen who mount and dismount cars, couple and uncouple cars, throw switches, etc. It is the exclusive duty of a groundman giving the signal to move a train to first inspect the equipment and area to verify that it is safe to make the move in question, before giving such a signal. If there is any question about the safety of the move, work is immediately halted and the move is not made. A yardmaster is then contacted before any further action is taken.

Petitioner had worked for the Railroad as a groundman for approximately seventeen years at the time of the occurrence, and continues to perform such duties to the present. Accordingly, Petitioner was, and is, an experienced groundman well familiar with the applicable safety rules and procedures utilized in the movement of the cars. Throughout his seventeen years working for the Railroad prior to the occurrence, Petitioner had, by his own estimation, thrown hundreds of switches and was well familiar with all of the instrumentalities utilized in the process.

Petitioner has candidly acknowledged the groundman's responsibility to check the equipment and area to verify the safety of a move before signalling the engineer to make it. He has also acknowledged the procedure to follow if the groundman has any question about the safety of the proposed move, in terms of immediately halting work and contacting the yardmaster. Petitioner himself has admittedly utilized that procedure many times over the years.

On February 19, 1993, Petitioner was working as a groundman (brakeman), along with a conductor and engineer, on the B-1 crew. Petitioner had worked this job many times before and was well familiar with its work. The B-1 crew

services the basic oxygen furnace ("BOF"), which includes use of the tracks in the "229" area. The "229" designation refers to an area of several hundred feet of track. There are three switches in the area, one of which is specifically referred to as the "229 switch." The crew had railroaded cars through the 229 switch, where the occurrence took place, several times earlier in the same shift without incident.

The crew needed to go through the 229 switch again to uncouple and set aside several cars it was pulling from the BOF, which were to be moved again later. The crew could then back its loaded cars into the BOF. In accordance with standard procedure, the conductor "dropped off" the train and waited at the BOF for the full ones. He was accordingly not involved in the move in question and did not observe it.

Petitioner uncoupled the empty cars where they were to be temporarily left and then signalled the engineer to move the locomotive and three loaded cars through the 229 switch, at which time he gave a signal for the train to stop. Petitioner was then to throw the 229 switch so that the points would move from the track where the empties were placed to the track to be used to back the loaded cars into the BOF. Petitioner indicated that he fully threw the switch and properly latched it.

Before giving the signal to the engineer to move the loaded cars through the 229 switch which he had just thrown, Petitioner, by his own admission, had the sole responsibility to check the switch, track, and cars, to verify that it was safe to move the cars through the thrown switch. Petitioner testified that he conducted the necessary visual inspection of the instrumentalities involved in the move, and saw absolutely nothing to indicate that there was any reason to question the safety of making the move.

Petitioner's visual inspection specifically included the "points" of the switch. The points of the switch are the short sections of rail which move so as to guide the wheels of the railroad car to one track or the other connected to the switch. It

is important for the groundman to verify that the points are flush against the switch and that there is no gap between the two. If the points are "gapped," then the wheel of a car may go between the points and the rail, while the wheel on the other side is being guided along the rail of the other track, thereby effectively guiding the same car in two different directions simultaneously, which generally results in a derailment. The process of the wheel going between the points and the rail is known as "picking" the switch.

Petitioner alleges that he specifically shined his lantern on the points in question and clearly saw that they were flush against the rail without any gap. He also testified that he visually inspected the tracks and terrain, as well as the cars to be moved, and similarly saw absolutely no problem with them whatsoever. Petitioner has conceded that if he had observed any condition which caused him to question the safety of making the move in question, he would not have signalled the engineer to move but would have stopped and contacted the yardmaster.

Having satisfied himself that it was safe to proceed with the move, Petitioner signalled the engineer to move the cars and climbed the hind car. A "platform" is mounted on the end of the car to provide a safe place to ride on it. Petitioner mounted the steps of the car in question to the platform before giving the signal to move. There is a railing around the platform to hold onto for safety, as the ride on industrial railroad cars is, again by Petitioner's own admission, often a bumpy one. Petitioner had ridden on the platforms of similar cars routinely over his many years as a groundman.

Once he was on the platform, Petitioner signalled the engineer to move. The engineer then moved the throttle of the locomotive, thereby beginning to back the three loaded cars through the 229 switch which Petitioner had just thrown. The cars had just barely begun to move through the switch and were still moving at their intended slow walking pace when Petitioner felt the car he was riding on bumping so as to

indicate to him that it could derail. Petitioner acknowledged that the applicable safety rule and procedure in such a situation is to remain on the platform until the car comes to rest. Petitioner, however, indicated that, at the time, he felt it was more appropriate to leap from the platform to the ground below.

Petitioner leapt from the platform as he signalled the engineer to stop. The car did in fact partially derail, with the back set of wheels coming off of the rails but the other wheels remaining on it. The cars came to a complete stop shortly after Petitioner's signal and jump from his position of safety on the hind car. In the course of jumping from the car, Petitioner sustained injury to his foot.[1]

It was determined that the partial derailment occurred at the 229 switch itself. The subsequent inspection of the car in question, however, revealed no defect or any other condition which would have caused or contributed to such an occurrence. The switch itself and immediately adjacent tracks, of course, were damaged in the course of the partial derailment, and thus inspection of them could offer no indication of why the partial derailment took place. Based upon all of the available evidence, it has never been determined what caused the subject partial derailment to occur. Petitioner, as well as all of the other experienced railroaders who testified in the course of discovery, uniformly agreed that while at times the cause of a derailment can be ascertained, there are other times when there is absolutely no apparent reason or explanation for the derailment. The men all agreed that such unexplained derailments are a part of the ordinary railroading process.

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[1] The partial derailment did not actually cause the injury. Rather, the injury was sustained when Petitioner leapt from his position of safety on the platform to the ground below. The reasonableness of Petitioner's decision in that regard presents a factual issue of negligence and causal relationship, and therefore was not before the Fourth Circuit in conjunction with the appeal, nor is it an issue before this Court.

Petitioner brought this action under the Federal Employers' Liability Act ("FELA"). 45 U.S.C. § 51 (1986). The case was set for a jury trial beginning November 20, 1995 before the Honorable Andre M. Davis, sitting in the United States District Court for the District of Maryland. While waiting for a panel of potential jurors, Judge Davis heard arguments on the Railroad's Motion in Limine and other typical preliminary matters.

The Railroad objected in the Motion in Limine to Petitioner's proffer of evidence of several prior derailments in the 229 area. The last of the prior unrelated derailments occurred more than nine days before the partial derailment here at issue. Thus, based on the undisputed evidence regarding the frequent use of the area, several thousand cars, including the car here at issue, had passed through the subject switch without incident between the most recent previous derailment and the subject partial derailment. In each of the prior unrelated derailments, there were no injuries and no allegations or findings of any negligence on the part of the Railroad.

The Railroad maintains repair records which indicate the location of the repair and the type of repair performed. These records affirmatively indicate that of the four prior derailments in question, two of them definitely did not occur at any of the three switches in the 229 area. For the other two, it is not possible to tell for certain, although none of the materials noted in the repair records indicate that any switch was involved. The records indicated that the causes of the prior derailments could similarly not be determined.

After hearing arguments on the Railroad's Motion in Limine to exclude evidence of the prior derailments, Judge Davis agreed that they were of no probative value to the case and were potentially inflammatory and confusing to the jury. He accordingly applied his discretion and granted the motion, citing Federal Rule of Evidence 403. Petitioner's counsel conceded that he had no other evidence of any negligence on

the part of the Railroad which could have caused or contributed to the subject occurrence. Petitioner's counsel further acknowledged that in the absence of the excluded evidence of prior derailments he would be proceeding solely on a theory of res ipsa loquitur.

Petitioner sought to proceed on a res ipsa loquitur theory because there has never been any explanation of the cause of the partial derailment at issue. The cars were checked immediately after the occurrence and no defects were found. The switch and immediately adjacent track were damaged in the partial derailment and thus could not offer evidence of the occurrence's cause. The Railroad noted that Petitioner had exclusive control over the instrumentalities involved in the occurrence, and admittedly had the exclusive responsibility to check them before giving a signal to proceed.

Accordingly, the Railroad argued that the occurrence was either due to Petitioner's own sole negligence, or some unexplained cause arising out of instrumentalities fully within his control at that time of the occurrence. The U.S. District Court ultimately granted the Railroad's motion for judgement as a matter of law.

On appeal, the United States Court of Appeals for the Fourth Circuit agreed and affirmed the lower court's decision. Specifically, the Fourth Circuit found that the trial court did not abuse its discretion in precluding Petitioner from introducing evidence of prior unrelated derailments. Additionally, the court found Petitioner's claims invoking the doctrine of res ipsa loquitur without merit, because the Petitioner failed to demonstrate that the subject partial derailment ordinarily would not have occurred in the absence of negligence and that the Petitioner failed to demonstrate that the Railroad alone controlled the switch and cars involved in the event. Petitioner then filed a petition of rehearing which was denied.

On December 13, 1996, the Petitioner filed this petition for writ of certiorari to this Court which was docketed on December 18, 1996.

REASONS FOR DENYING THE WRIT

Rule 10 of the United States Supreme Court Rules clearly establishes that the jurisdiction of the United States Supreme Court is strictly limited. Rule 10 states, "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." Furthermore, this rule provides, "[a] petition for a writ of certiorari is ***rarely*** granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Emphasis added). Given the facts of this case, the Petitioner completely fails to meet any of these requirements because there are no special and important reasons for this Court to grant this petition. In fact, the Petitioner concedes in his petition that the Fourth Circuit's decision does not change the state of the current law which this Court has established. The Supreme Court does not sit for the benefit of particular litigants. Rice v. Sioux City Cemetery, 349 U. S. 70, 74, 75 (1955)(citations omitted). (Petition, p. 18). Jurisdiction in this Court is not exercisable merely to give a party who did not prevail in the Circuit Court of Appeals another hearing. See Magnum Import Co. v. Coty, 262 U.S. 159 (1923).

Given the strict jurisdictional requirements for review of a case by the United States Supreme Court, the Petitioner offers no compelling reasons why this case should be reviewed by this Court. Even assuming *arguendo* that the Fourth Circuit's opinion is incorrect with respect to the facts of this case, the Fourth Circuit's statement of the law is correct and does not entail an aberration of existing common or statutory law necessary for correction by the United States Supreme Court.

I. The Fourth Circuit Correctly Affirmed The District Court's Decision To Act Within Its Sound Discretion In Granting The Railroad's Motion In Limine Excluding Evidence Of Prior Unrelated Derailments Where Thousands Of Cars Travelled Through The Same Switch Between The Last Prior Derailment And The Subject Occurrence, Where The Prior Occurrences Did Not Occur Under Substantially Similar Circumstances, Where There Was No Evidence That Any Of The Prior Derailments Occurred At The Switch At Issue, And There Was No Evidence Of Negligence In Any Of The Prior Derailments.

Petitioner proffered evidence of several prior unrelated derailments in an attempt to show that the Railroad breached its duty to provide its employees a safe place to work and to show an absence of contributory negligence. The trial court granted the Railroad's Motion in Limine barring such evidence, finding that under Rule 403 the probative value of that evidence did not outweigh the likelihood of unfairness, confusion of the issues, and delay that would have been occasioned. Recognizing that such a decision was entirely within the trial court's purview, the Fourth Circuit found that the trial court did not abuse its discretion. (Fourth Circuit Opinion, Petitioner Appendix, App. 6).

The prior unrelated derailments the Petitioner attempted to rely upon did not occur under substantially similar circumstances to the partial derailment involved in this case. (Fourth Circuit Opinion, Petitioner Appendix, App. 6). Evidence of prior occurrences is only admissible where they "have occurred under substantially similar circumstances." Edward v. Consolidated Rail Corp., 576 F. Supp. 1087, 1105 (D.D.C. 1983), aff'd, 733 F.2d 966 (D.C. Cir. 1984), cert. denied, 469 U.S. 883 (1984); Sears, Roebuck & Co. v. Copeland, 110 F.2d 947, 949 (4th Cir. 1940) (prior accidents

must have occurred "under substantially the same conditions, at substantially the same place ... and at a time not too remote."). See also Sparks v. Gilley Trucking Inc., 992 F.2d 50 (4th Cir. 1993) (reversing and remanding because evidence of prior speeding tickets was improperly admitted by the trial court).

Here, the circumstances of the subject partial derailment differ dramatically from the prior occurrences. The most recent of the prior derailments occurred on February 10, 1993, nine days before the partial derailment at issue. This heavily trafficked area in the heart of the Bethlehem Steel plant undisputedly had several thousand railroad cars, many loaded with steel, travel over it in those nine days. Petitioner's crew had railroaded cars through the 229 switch several times earlier in the same shift before the occurrence without incident. In fact, the very same set of railroad cars had been railroaded through the same switch immediately before the occurrence at the switch, in the course of the move in question. It would be patently absurd to suggest that there was some unsafe condition which caused or contributed to one of the prior unrelated derailments (which there is no evidence of), but which in turn permitted several thousands of cars through the same switch without incident, including the very same car at issue, before somehow causing the subject occurrence. Moreover, Petitioner himself claims that he visually inspected the track, switch, and cars in question immediately before the occurrence and, based upon his seventeen years of experience during which he had thrown hundreds of switches, saw no indication of any defect or condition which could cause or contribute to a derailment.

There is absolutely no evidence that any of the prior derailments occurred at the switch at issue here. The Railroad maintains repair records which indicate the location of all repairs and the repairs performed. These records affirmatively indicate that at least two of the derailments did not occur at any of the three switches on track 229. For the other two, it is

impossible to tell for certain whether they occurred at a switch or not, but the materials used in the repairs do not indicate that a switch was involved.

There is also absolutely no evidence of any negligence causing or contributing to any of the prior derailments. Moreover, there could be no possible causal relationship between the prior events and the subject occurrence, due to the enormous number of cars going through the switch without incident since the last prior derailment. To allow such evidence would force the Railroad to try the case for all five derailments, instead of the lone one at issue. The Fourth Circuit appropriately recognized that the proffered evidence is of no probative value and is highly prejudicial because it would allow jurors to improperly infer negligence in this case from prior derailments which, themselves, have never been alleged or found to be due to any negligence on the part of the Railroad. (Fourth Circuit Opinion, Petitioner Appendix, App. 6).

There are a number of cases among both federal and state courts supporting this decision and demonstrating that there is no confusion among the federal circuit courts requiring clarification by the United States Supreme Court. Courts consistently find evidence of prior occurrences inadmissible where the circumstances of the prior events are not sufficiently similar to that at issue. Amatucci v. Delaware and Hudson Railway Co., 745 F.2d 180 (2d Cir. 1984) (FELA case reversed and remanded for a new trial because of admission of evidence of prior heart attacks suffered by other engineers); Kelsay v. Consolidated Rail Corp., 749 F.2d 437 (7th Cir. 1984) (affirming the trial court's decision to exclude evidence of two prior accidents at the same railroad crossing); Horn v. Chicago, Rock Island & Pacific Railroad Co., 357 P.2d 815 (Kan. 1960) (affirming exclusion of evidence of prior collision at railroad crossing).

Even Cereste v. New York, New Haven and Hartford Railroad Co., a case heavily relied upon by Plaintiff, states that

evidence of prior instances of coal falling out of railroad cars "could not have been prejudicial in light of the overwhelming proof that coal had so fallen on that path at the approximate time of the accident." 231 F.2d 50, 53 (2d Cir. 1955), cert. denied, 351 U.S. 951, 76 S. Ct. 848 (1956). In the case at bar, there is no such corroborating evidence of negligence in any of the prior occurrences.

Where prior occurrences or acts do not occur under substantially similar circumstances, they are inadmissible. (Fourth Circuit Opinion, Petitioner Appendix, App. 6). Here, the proffered prior events clearly did not occur under substantially similar circumstances because they occurred nine days, or more, earlier on a track which had been travelled through uneventfully by thousands of cars, including the car at issue, in the interim. There is no evidence that any of the prior derailments occurred at the switch at issue here, and there were no allegations or findings of negligence in any of the prior occurrences. Such evidence is highly prejudicial and inflammatory and was properly excluded pursuant to Rule 403.

Petitioner proffered evidence of the prior acts as evidence of a breach of some duty on the part of the Railroad, or, in the alternative, as evidence of an absence of contributory negligence on Petitioner's part. Neither of these bases for admission are appropriate. "Evidence of other ... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ... ." Fed. R. Evid. 404(b) (1995). Evidence of other acts, however, cannot be used to prove negligence itself. Likewise, such evidence is not relevant to the issue of contributory negligence. Plaintiff was not involved in any of the prior unrelated occurrences, and thus their admission would not tend to make the determination of contributory negligence more or less probable. See Fed. R.

Evid. 401, 402 (1995). Evidence of prior unrelated derailments is inadmissible on both grounds for which it was proffered by Petitioner, and, indeed, is inherently inadmissible because of its tendency to unfairly prejudice the jury.

Indeed, the only conceivable relevance of this evidence would be to show notice of an unsafe condition under a negligence theory of the case.[2] However, considering that thousands of railroad cars had travelled over this area without incident since the last prior derailment, that the very car at issue had travelled over the switch without incident, that there was no evidence of negligence in any of the prior derailments, and that Petitioner himself inspected the area and considered it safe before signaling, it would be absurd to suggest that any of these prior occurrences provided the Railroad with notice of any unsafe condition.

Admission of evidence, particularly potentially prejudicial evidence, is generally left to the sound discretion of the trial judge. Larkins v. Farrell Lines, Inc., 806 F.2d 510, 515 (4th Cir. 1986), cert. denied, 481 U.S. 1037, 107 S.Ct. 1973 (1987). ("The Rule 403 balance is essentially a matter of trial conduct; 'if judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.'") (citation omitted). Such a decision should only be overturned where there is a clear abuse of that discretion.

The Fourth Circuit recognized that the trial court properly considered the fact that there is no evidence that any of the prior occurrences happened at the switch at issue; that thousands of railroad cars had travelled through the switch in question without incident since the last derailment; that the very same car travelled through the subject switch without incident immediately before the occurrence; and that there

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[2] This evidence, in fact, was Plaintiff's only proffered evidence of negligence and is clearly insufficient to support a finding of negligence. Moreover, it is not relevant to a res ipsa loquitur theory.

were no allegations or findings of negligence for any of the prior occurrences, in finding that the proffered evidence of prior derailments would be inadmissible under Rule 403. (Fourth Circuit Opinion, Petitioner Appendix, App. 5-6). The prior derailments did not occur under substantially similar circumstances to the occurrence at issue. They were proffered for the improper purposes of proving negligence itself, or lack of contributory negligence, issues on which the proffered evidence is not relevant. As discretion rested squarely with the trial judge to weigh the probative value of such evidence, or lack thereof, against the confusion, prejudice and delay which would be created by its admission, the Fourth Circuit found that the trial judge acted well within his sound discretion in excluding such evidence, and accordingly affirmed that decision. (Fourth Circuit Opinion, Petitioner Appendix, App. 6).

II. Given the facts of this case, the Fourth Circuit's opinion is consistent with the precedent established by the United States Supreme Court with respect to the doctrine of res ipsa loquitur as applied in FELA cases.

The Federal Employers' Liability Act (FELA) provides that "[e]very common carrier by railroad ... shall be liable in damages to any person suffering injury while he is employed by such carrier ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (1986). Enacted in 1908, this statute eliminated several common-law tort defenses that had effectively barred recovery by railroad workers, abolishing the fellow servant rule and contractual waivers, rejecting contributory negligence in favor of comparative negligence and, in a 1939 amendment, abolishing the assumption of risk defense. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2404 (1994).

Congress chose not to subject railroad employees to a no-fault workers' compensation scheme which carries with its limited burden of proof a similarly limited benefit scheme. See, id. Instead, the FELA requires employees to prove fault in order to recover, but as a sequential trade-off, allows them to seek common law tort damages, which can far exceed workers' compensation benefits. Although the FELA provides a relaxed standard, by abrogating or modifying certain specific common-law defenses to liability, it is expressly not a no-fault workers' compensation statute. Id. Indeed, the FELA follows traditional common-law rules unless they are specifically and explicitly rejected in the text of the statute. Id. As this Court recently reiterated, "[w]e have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.'" Id. (quoting Ellis v. Union Pacific Railroad Co., 329 U.S. 649, 653, 67 S. Ct. 598, 600 (1947)). See also Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 138, 140, 80 S. Ct. 242, 244 (1959); Healy v. Pennsylvania Railroad Co., 184 F.2d 209, 213 (3d Cir. 1950).

The common-law doctrine of res ipsa loquitur literally means that "the thing speaks for itself." Sweeney v. Errving, 228 U.S. 233, 238, 33 S. Ct. 416, 418 (1913). In order to make out a prima facie res ipsa loquitur case, a plaintiff must establish that: (1) the event is of a type which ordinarily does not happen in the absence of someone's negligence; (2) the instrumentality causing the injury was, at the time of the accident, within the exclusive control of the defendant; and (3) the accident was not due to any voluntary action on the part of the plaintiff. Stillman v. Norfolk & Western Railway Co., 811 F.2d 834 (4th Cir. 1987); Larkins v. Farrell Lines.Inc., 806 F.2d 510 (4th Cir. 1986), cert. denied, 481 U.S. 1037, 107 S.Ct. 1973 (1987). The application of res ipsa loquitur has been properly limited to only those FELA cases where these elements are met. See Stillman 811 F.2d at 836-37. Res ipsa

loquitur is a rule of evidence which does not shift the burden of persuasion but only shifts the burden of production. Ramsouer v. Midland Valley Railroad Co., 135 F.2d 101, 106 (8th Cir. 1943); Sweeney, 228 U.S. at 238.

To prevail under the FELA, a plaintiff must prove that he or she was injured as a result of some negligence on the part of the Railroad. Atlantic Coast Line Railroad Co. v. Temple, 285 U.S. 143, 147, 52 S. Ct. 334, 336 (1932). In Atlantic Coast Line Railroad Co. v. Craven, the Fourth Circuit reversed an FELA jury verdict in favor of the employee plaintiff where there was no evidence of the railroad's negligence, stating: "[t]his case must be reversed because there was no substantial evidence upon which the question of negligence could have been submitted to the jury. Although decisions under the Act are most liberal in allowing employees to recover, it has been reaffirmed time and again that recovery lies only upon the concurrence of negligence and injury as cause and effect." 185 F.2d 176, 178 (4th Cir. 1950), cert. denied, 340 U.S. 952, 71 S. Ct. 571 (1951). "The great majority of railroad accidents ... could by some means be prevented. The test is whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger." Craven at 179. In the case at bar, as in Craven, the "chances of injury to plaintiff, however, were no greater than those inherent in his type of employment." Craven at 179.

To prove negligence, plaintiff must provide more than just evidence of an accident. "The mere happening of an accident, ... does not give rise to a res ipsa inference of negligence or breach of duty." Larkins at 512. "Where varying explanations are equally probable, res ipsa loquitur cannot apply." Id. "[F]ar too little is known of the facts ... to 'let the thing stand for itself.'" Id. at 513. As the Supreme Court made clear in Herdman v. Pennsylvania Railroad Co., if the "proofs do not meet the tests laid down by this Court in Jesionowski," then a jury question under res ipsa loquitur is not presented in

an FELA case. 352 U.S. 518, 520, 77 S. Ct. 455 (1957) (citing Jesionowski v. Boston & M.R.R., 329 U.S. 452, 67 S. Ct. 401 (1947)).

The Petitioner attempts to rely on the common-law doctrine of res ipsa loquitur for submission of the herein case to the jury. However, as the Railroad argued, and both lower courts correctly found, res ipsa loquitur cannot be applied in this case because under traditional common-law rules of res ipsa loquitur Petitioner fails to meet the elements necessary to make out a jury question.

The Fourth Circuit correctly held that Petitioner fails to meet each of the three prongs of the res ipsa loquitur test. (Fourth Circuit Opinion, Petitioner Appendix, App. 6). It is noteworthy for this Court to recognize that with respect to determining whether the Fourth Circuit deviated from current law, courts must not over-extend res ipsa loquitur in FELA cases so as to arbitrarily create liability where the injury occurred without negligence on the part of the employer railroad, as that would be contrary to the letter and spirit of the FELA. The "question of whether the facts warrant submission to a jury on a res ipsa theory is of a different nature, owing to the strictures of that theory designed to prevent a jury from speculating as to negligence, rather than properly inferring its existence from circumstantial evidence." Moser v. Agway Petroleum Corp., 866 F. Supp. 262, 263 (D. Md. 1994), aff'd, 67 F.3d 296 (4th Cir. 1995). The FELA does not make the employer an insurer for all injuries, and the doctrine of res ipsa loquitur cannot be used to improperly achieve that same end. See Gottshall, 114 S. Ct. 2396, 2409 (1994); Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 138, 140, 80 S. Ct. 242, 244 (1959); Healy v. Pennsylvania Railroad Co., 184 F.2d 209, 213 (3d Cir. 1950). The Fourth Circuit recognized the importance of not over-extending the res ipsa loquitur theory, and therefore, determined that to allow this case to go to the jury on a theory of res ipsa loquitur would be tantamount to imposing strict liability on the Railroad, a result

specifically prohibited by the legislature and the United States Supreme Court. See (Fourth Circuit Opinion, Petitioner Appendix, App. 14-15).

As recognized in Moser v. Agway Petroleum Corp., the "first and foremost requirement" to make out a res ipsa loquitur case is that the accident would not have occurred in the absence of negligence. 866 F. Supp. 262, 263 (D. Md. 1994), aff'd, 67 F.3d 296 (4th Cir. 1995) (finding insufficient evidence that a reasonable rational jury could infer that explosions of old radiators only occur because of negligence where there is no other evidence of negligence besides the plaintiff's own). If this first prong is not met, the plaintiff has not presented a jury question on a res ipsa loquitur theory. Herdman v. Pennsylvania Railroad Co., 352 U.S. 518, 77 S. Ct. 455 (1957) (plaintiff in FELA case failed to prove that unscheduled and sudden stops of train are extraordinary and thus did not present a jury question under the theory of res ipsa loquitur). (Fourth Circuit Opinion, Petitioner Appendix, App. 12).

Petitioner here failed to proffer any evidence that derailments never occur in the absence of negligence. In contrast, the Railroad proffered uncontradicted evidence that derailments can and do at times occur, in the ordinary course of railroading, totally without explanation and without negligence. As both lower courts readily acknowledged, railroad cars do derail in the absence of negligence by the railroad. (Fourth Circuit Opinion, Petitioner Appendix, App. 8-9).

Petitioner relies on Jesionowski v. Boston & M.R.R., for the proposition that, as a matter of law, derailments never occur in the absence of negligence. 329 U.S. 452, 67 S.Ct. 401 (1947). (Fourth Circuit Opinion, Petitioner Appendix, App. 12). In Jesionowski, the Court found that a jury question was presented under a res ipsa loquitur theory where the plaintiff had been killed in the accident and thus was unavailable to testify, and where the Court noted specific facts surrounding

the occurrence from which negligence could be implied. Focussing on the exclusive control element of res ipsa loquitur, the Court expressed concern that where an employee's injury was fatal, the employee would be unable to prove exclusive control by the railroad, and the case would never reach the jury. Thus, Jesionowski must be viewed in the context of the Court's concern and focus on the exclusive control element of res ipsa loquitur and the inability of the plaintiff to testify regarding the conditions involved in his death in the occurrence, as well as the other corroborating evidence of negligence.

Petitioner attempts to read Jesionowski as standing for the proposition that, as a matter of law, derailments only ever occur because of negligence. This overly broad reading of Jesionowski, however, fails to consider the other evidence of negligence in that case, including evidence of a "frog" of a switch operated with a spring mechanism that could have caused the derailment, and evidence of splinters and planks on the track near the frog which could also readily have caused the derailment. Id. at 455. The case falls far short of creating a legal standard whereby all derailments, regardless of other factors, as a matter of law, only occur as a result of negligence.

Both lower courts correctly stated and applied the holding of this Court in Jesionowski. In applying that law, each court determined that a derailment by itself is insufficient as a matter of law to invoke the theory of res ipsa loquitur.

Petitioner has provided absolutely no affirmative evidence that derailments only occur as a result of negligence. On the contrary, the Railroad proffered undisputed evidence, including the Petitioner's own testimony, that derailments can and do occur, in the ordinary course of railroading, without any apparent reason or cause whatsoever. No such evidence was apparently offered to the Jesionowski Court. Thus, if Jesionowski does not, as both the trial court and Fourth Circuit correctly found, create a legal presumption that derailments only occur because of negligence, then Petitioner has failed to

meet his burden of proof on this element of res ipsa loquitur, and the judgments below in favor of the Railroad should remain undisturbed as no further clarification of the law by this Court is necessary.

The Railroad did not, as required in order for Petitioner to make out a prima facie case under a res ipsa loquitur theory, have exclusive control of the instrumentalities involved in the occurrence. On the contrary, Petitioner himself admittedly exerted exclusive control over them at the time in question. Petitioner alone was responsible for verifying that the switch was thrown and latched correctly, and for verifying that it was safe to proceed. There is no proximate cause of the injury where Petitioner himself controlled the instrumentalities and acts which precipitated the injury.

As the Fourth Circuit reiterated in the FELA case of Stillman v. Norfolk & Western Railway Co., "[i]n the absence of exclusive control by the Railroad over the instrumentality that injured [the plaintiff], the doctrine of res ipsa loquitur could not properly be applied to create an inference of negligence on the part of the Railroad." 811 F.2d 834, 837 (4th Cir. 1987). In Stillman, the Fourth Circuit affirmed a verdict in favor of the railroad where the plaintiff had placed himself partially under forklift blades in an attempt to free the attached chain from the blades. Id.

In this case, the Fourth Circuit recognized, consistent with its decision in Stillman, that any control of the instrumentalities in question by the Railroad was exercised at least partially through Petitioner himself. (Fourth Circuit Opinion, Petitioner Appendix, App. 12). Petitioner alone was, by his own admission, responsible for switching, latching, verifying that there were no gaps, and signalling only if it was safe to proceed. With Petitioner having exerted such total control over the instrumentalities involved, it is inconceivable that the Railroad could be found to have exerted exclusive control over them. Because this second element of res ipsa

loquitur is not met, Petitioner has failed to make out a jury question under a res ipsa loquitur theory.

To present a jury question under res ipsa loquitur, a plaintiff must prove that the occurrence was not due to his or her own voluntary act. Larkins v. Ferrell Lines, Inc., 806 F.2d 510, 513 (4th Cir. 1986), cert. denied, 481 U.S. 1037, 107 S. Ct. 1973 (1987). In other words, the plaintiff must prove that there was no contributory negligence. Here, either the occurrence was necessarily caused by the negligence of Petitioner himself, or it was not caused by any negligence at all. Thus, if Petitioner was not contributorily negligent, then there is no negligence at all.

In Hurley v. Patapsco & Back Rivers Railroad Co., the Fourth Circuit affirmed judgment as a matter of law in favor of this same railroad where an FELA plaintiff's own negligence was the sole proximate cause of the accident. 888 F.2d 327 (4th Cir. 1989). The plaintiff, an expert machinist, was injured by a lathe when he leaned towards it and it caught his sweater. Id. at 328. The plaintiff offered evidence in his attempt to show that the occurrence was due to negligence on the part of the railroad, including lack of direct light, dirty windows, a shadow from the position of the machine, and previous requests for additional lighting. Id. at 329. The Fourth Circuit, however, in the face of such evidence, stated that: "[a]ppellant's evidence in this case was such that the jury could have reached a verdict in his favor only by speculating." Id. at 329.

In the case at bar, the Fourth Circuit determined Petitioner was, by his own admission, responsible for switching, latching, checking for potential problems, and signalling only when it was safe to proceed. If it was not safe to proceed, it was Petitioner's sole responsibility, which he similarly acknowledged, not to signal the car forward. If the partial derailment at issue occurred as a result of some negligence, it could only be due to Petitioner's "significant role in the events leading to his injuries which demonstrates that

the Railroad did not exclusively control the instrumentalities." (Fourth Circuit Opinion, Petitioner Appendix, App. 14). As such, the third element of res ipsa loquitur is not met, no jury question is presented and the decisions of the two lower courts are correct.

CONCLUSION

Accordingly, the Petitioners have failed to present any issue sufficient to invoke the jurisdiction of the Supreme Court of the United States. For that reason and for all of the foregoing reasons, the Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 96-972

In The Supreme Court of the United States

October Term 1996

RONALD C. MANDRGOC,
Petitioner,

v.

PATAPSCO & BACK RIVERS RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

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STATUTES AND RULES INVOLVED IN THE CASE

45 UNITED STATES CODE ANNOTATED

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being

employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

FEDERAL RULES OF EVIDENCE

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it could be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(b) Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important

matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.